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VIA ELECTRONIC MAIL

Delores Brown, Chief
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Department of Water Resources
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Dear Ms. Brown:

COMMENTS ON PREPARATION OF A JOINT DRAFT ENVIRONMENTAL IMPACT REPORT/ENVIRONMENTAL IMPACT STATEMENT FOR THE BAY DELTA CONSERVATION PLAN

This letter responds to the California Department of Water Resources' (DWR) March 17, 2008 Notice of Preparation (NOP) for a joint draft Environmental Impact Report (EIR)/Environmental Impact Statement (EIS) for the Bay Delta Conservation Plan (BDCP). The State Water Board appreciates the opportunity to contribute information regarding the development of reasonable alternatives and potential environmental impacts to be addressed in the EIR/EIS for the BDCP.

According to the NOP, the BDCP process is intended to provide the basis for DWR, State Water Project (SWP) and federal Central Valley Project (CVP) water contractors, and Mirant Delta to apply for incidental take permits pursuant to section 10 of the Federal Endangered Species Act (FESA) and California Fish and Game Code section 2835 and/or 2081. The BDCP is also intended to provide the U.S. Bureau of Reclamation (USBR) the ability to obtain Biological Opinions and incidental take statements pursuant to section 7 of FESA. Additional core purposes of the BDCP identified in the NOP include conserving, protecting, and restoring at risk species and their habitats and providing for water supplies and ecosystem health within a stable regulatory framework.

The NOP states that the BDCP will likely consist of several major elements, including new capital improvements to the water supply conveyance system (e.g., dual or isolated conveyance systems¹) in the Delta, a restoration program in order to improve the ecological productivity and sustainability of the Delta, and a monitoring and adaptive management plan for the restoration program. The plan will also likely include operational improvements for the water supply system in the near-term and for the long-term once any capital improvements have been completed and put into operation.

¹ New dual or isolated conveyance systems would require a canal from the Sacramento River to the SWP's Harvey O. Banks and the CVP's C.W. Jones pumping plants near Tracy which would likely require approval by the State Water Board of petitions to change the SWP's and CVP's authorized points of diversions.

General Comments

The mission of the State Water Board and the Regional Water Quality Control Boards (Regional Water Boards) is to preserve, enhance, and restore the quality of California's water resources, and ensure their proper allocation and efficient use for the benefit of present and future generations. The State Water Board administers water rights in California, including those of the SWP and CVP. The State and Regional Water Boards also have primary authority over the protection of the State's water quality. While the BDCP planning effort is still in the preliminary stages, and details regarding this project are as yet unclear, it appears that the State and Regional Water Boards will have discretionary approvals over water right and water quality aspects of the project and are responsible agencies for this project under the California Environmental Quality Act (CEQA). As responsible agencies under CEQA, the State and Regional Water Boards must review and consider the environmental effects of the project identified in the EIR/EIS that are within their purview and reach their own conclusions on whether and how to approve the project involved. (Cal. Code Regs., tit. 14, § 15096, subd. (a).)

Specifically, activities that may require approval by the State and Regional Water Boards include: changes to the SWP's and CVP's points of diversions of water or to other provisions of their water rights to accommodate dual or isolated conveyance options, water quality certifications pursuant to Clean Water Act section 401, National Pollutant Discharge Elimination System Permitting for the Mirant Delta power plants, and potentially other activities. In addition, any changes to conveyance of water in the Delta and other possible components of the BDCP could result in changes to flow paths in the Delta that may affect the ability of the SWP, CVP, and other responsible parties to meet water right permit/license and other requirements to implement water quality objectives included in the Bay-Delta Water Quality Control Plan (Bay-Delta Plan).

To address the above issues, the EIR/EIS must analyze the impacts to water quality and beneficial uses (including fish and wildlife resources) associated with BDCP-covered activities and identify feasible alternatives or mitigation measures that would mitigate or avoid any significant impacts of the project on water quality or beneficial uses. For example, BDCP alternatives could have impacts on water and sediment quality in the Delta including: salinity, mercury, nutrients, dissolved oxygen, dissolved organic carbons, turbidity, temperature, and other constituents within the State and Regional Water Boards' purview.²

In addition, to achieve BDCP's project objectives to assure protection and restoration of fish and wildlife resources, the EIR/EIS should analyze a broad range of alternate water quality objectives and operational strategies, including reductions in exports, that may be more protective of fish and wildlife beneficial uses. The State Water Board may use this and other information to consider potential changes to the Bay-Delta Plan and its implementation to

² The Bay-Delta is listed as impaired pursuant to Clean Water Act section 303(d) for a variety of toxic contaminants including group A pesticides, Diazinon, Chlorpyrifos, DDT, PCB's, Dioxin, Furan, metals, selenium, nickel, mercury, toxicity, exotic species, nutrients, pathogens, and oxygen demanding substances that cause critically low dissolved oxygen. In addition, there is concern that a number of emerging contaminants could affect beneficial uses such as heavy metals and other naturally occurring elements, pharmaceuticals and endocrine disrupting compounds, blue-green algal blooms, organic carbon and bromide.

protect fish and wildlife and other beneficial uses of water in the Bay-Delta. Accordingly, the State Water Board requests analysis of a broad range of alternatives under the following scenarios: (1) potential interim changes to the Bay-Delta Plan; (2) long-term changes to the Bay-Delta Plan with new conveyance facilities; and (3) long-term changes to the Bay-Delta Plan without new conveyance facilities. Specifically, the State Water Board requests analysis of a broad range of conveyance alternatives, flows (including changes to Delta outflow objectives), and diversions by the SWP and CVP (including reduced diversions or a cap on diversions) for providing open water habitat under the above scenarios.

The EIR/EIS analyses also should consider water quality activities that have been initiated by the State and Regional Water Boards, but are not yet complete. Specifically, the State Water Board has begun a review of the southern Delta salinity and San Joaquin River flow objectives included in the Bay-Delta Plan. As a result of that review, the State Water Board may modify the southern Delta salinity or San Joaquin River flow objectives. The EIR/EIS should consider the information developed in this process and the potential future changes in these boundary conditions in its analyses. In addition, the EIR/EIS analyses should consider other known and foreseeable projects by the State and Regional Water Boards, including those discussed in the Strategic Workplan for the Bay-Delta (Workplan) which describes activities the State and Regional Water Boards intend to take in the Bay-Delta over the next five years. A draft Workplan is planned for release for public comment in the beginning of June and is expected to be considered by the State Water Board for approval at its July 15, 2008 Board meeting, followed by consideration by the Central Valley and San Francisco Bay Regional Water Boards later this year.

Moreover, before the State Water Board may approve a change in a water right permit or license, it must find that the change will not injure any legal user of water. (Wat. Code, § 1702.) Accordingly, if the proposed project will involve any changes in water rights, the EIR/EIS should fully analyze and propose mitigation for any potential impacts of the project on other legal users of water (and on public trust resources to the extent not already addressed). While CEQA does not specifically require analysis of impacts to other legal users of water, there may be direct or indirect environmental impacts associated with the project that would require analysis under CEQA.

Further, regardless of its responsibilities under CEQA, the State Water Board must consider the full range of impacts associated with the BDCP in order to fulfill its responsibilities under the public trust doctrine. The State Water Board has an independent obligation to consider the effect of the proposed project on public trust resources and to protect those resources where feasible, and to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 [189 Cal.Rptr. 346]; Cal.Const., art. X, § 2; Wat. Code, § 275.)

Pursuant to its authority under the Water Code, the State Water Board may request additional information outside of the CEQA process in order to meet the State Water Board's public trust and other obligations. Accordingly, while BDCP parties may determine that CEQA does not require an analysis of all of the issues discussed herein (including impacts to other legal users of water and public trust resources), it would further the State Water Board's consideration of

the BDCP if the draft EIR/EIS discussed these issues. Given the similarity of the scope of analyses, it would be expeditious to address these issues in one document.

Specific Comments on the NOP

In addition to the above general comments, the State Water Board provides additional specific comments on the NOP, as follows:

At the top of page 4, the NOP states that formal preparation of the EIR/EIS will commence once the BDCP has been further developed. The State Water Board reserves the right to provide additional comments once additional information becomes available. This information may be provided in writing or through participation in the BDCP Steering Committee, technical teams, or workgroups.

In the third paragraph on page 4, the NOP states that the BDCP is being developed to set out near- and long-term approaches to meet the objectives of the BDCP. Any near-term actions that involve activities within the State or Regional Water Boards' regulatory purview should be coordinated with the appropriate agency as soon as possible to assure that adequate analyses are conducted to satisfy the State and Regional Water Boards' regulatory requirements.

In the first paragraph on page 5, the NOP states that the BDCP is anticipated to include a comprehensive monitoring, assessment, and adaptive management program. Development of this program should be coordinated with the water quality compliance and baseline monitoring required by the State Water Board pursuant to Decision 1641 and the Regional Monitoring Program currently being developed by the Central Valley Regional Water Board.

The last paragraph on page 5 lists activities that may be included in the BDCP, including, among others: (1) existing Delta conveyance elements and operations of the SWP and CVP; (2) new Delta conveyance facilities; (3) operational activities in the Delta related to water transfers involving water contractors or to serve environmental programs; (4) projects designed to improve Delta salinity conditions; and (5) existing power generation operations of the Mirant Delta power plants, among other activities. As discussed above, the EIR/EIS must address the State and Regional Water Boards' regulatory requirements related to these issues. It must identify any impacts to beneficial uses of water that may result from these activities, and propose alternative measures or mitigation measures to reduce or avoid any impacts.

On page 7 under the project area discussion, the NOP states that the BDCP may include conservation actions in Suisun Marsh and Suisun Bay. Any such actions should be coordinated with the State and Regional Water Boards and the development of the Suisun Marsh Habitat Management, Preservation, and Restoration Plan.

Role of the State Water Board in the BDCP Process

In the second paragraph on page 4, the NOP states that the BDCP is being prepared with the participation of the State Water Board and other agencies. To clarify, the State Water Board is participating in the BDCP planning process for the limited purposes of advising the BDCP parties of the State Water Board's regulatory requirements and providing technical information.

The State Water Board is neither a party to the BDCP planning agreement nor a decision-making member of the Steering Committee. By participating in the process in an advisory capacity, the State Water Board hopes to ensure that a broad range of alternatives is evaluated, and the potential impacts of all the alternatives are fully disclosed.

While the State Water Board can provide information that will help guide the BDCP parties toward a successful completion of the BDCP process, the State Water Board cannot make a prior commitment to the outcome of any regulatory approval that must be issued by the State Water Board. The State Water Board acts in an adjudicative capacity when it acts on a request for water right application, change petition, or other water right approval that may be required for or requested in connection with a proposed project. The State Water Board must be an impartial decision-maker, avoiding bias, prejudice or interest, in any adjudicative proceedings conducted in accordance with the State Water Board's regulatory approvals. Accordingly, State Water Board staff will not act as advocates for any alternatives considered during the BDCP process.

In closing, the State Water Board will continue to participate in the BDCP Steering Committee and working groups and technical teams to advise BDCP regarding the State Water Board's regulatory and informational requirements. Thank you for the opportunity to comment. If you have any questions, please contact Diane Riddle, Staff Environmental Scientist with the Division of Water Rights at (916) 341-5297, or at driddle@waterboards.ca.gov.

Sincerely,



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Executive Director

cc: See next page.

Ms. Delores Brown
Department of Water Resources

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May 30, 2008

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